Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,
Petitioner,

v.

RITA BASTIEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the order of the district court is an immediately appealable collateral order when it substitutes, without statutory authorization, "the Congress" for the named defendant, a Senate office, upon the dissolution of that Senate office due to the end of the U.S. Senator's term of office?

2. Whether an order denying a claim of federal sovereign immunity is immediately appealable pursuant to 28 U.S.C. § 1291?

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PETITION FOR A WRIT OF CERTIORARI

The Senate Chief Counsel for Employment, on behalf of the Petitioner, the Office of Senator Ben Nighthorse Campbell ("the Campbell Office"), former office of the former United States Senator, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a)[1] is reported at 454 F.3d 1072. The order of the court of appeals denying rehearing en banc (App. 9a-10a) is unreported. The order of the district court denying the Campbell Office's

[1] Pages of the appendices to the petition, attached hereto, are referred to as App. ____.

motion to dismiss on grounds of abatement and mootness (App. 11a-25a) is unreported. The order of the district court denying rehearing and certifying the matter for immediate appeal (App. 26a-33a) is unreported.

JURISDICTION

On June 28, 2006, the court of appeals dismissed the Campbell Office's appeal for lack of appellate jurisdiction. The court of appeals denied the Campbell Office's motion for rehearing en banc on August 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 410 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1410, provides:

> OTHER JUDICIAL REVIEW PROHIBITED.
>
> Except as expressly authorized by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this chapter and any action taken pursuant to this chapter shall not be subject to judicial review.

Section 408(b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1408(b), provides:

> CIVIL ACTION.
>
> . . . .
>
> (b) PARTIES.–The defendant shall be the employing office alleged to have committed the

violation, or in which the violation is alleged to have occurred.

Section 101(9) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1301(9), provides:

(9) EMPLOYING OFFICE.–The term "employing office" means–

(A) the personal office of a Member of the House of Representatives or of a Senator;

(B) a committee of the House of Representatives or the Senate or a joint committee;

(C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(D) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

STATEMENT

1. This case addresses the interlocutory appealability of an order denying a claim of sovereign immunity by an office of a former U.S. Senator.

2. The underlying action involves claims filed by Rita Bastien ("Bastien"), a former employee of the Campbell Office, under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) ("CAA") against the Campbell Office. The CAA applies select provisions of eleven federal employment laws to certain offices within the "legislative

branch of the Federal Government." 2 U.S.C. § 1302(a). The CAA authorizes federal district courts to adjudicate certain CAA claims, see 2 U.S.C. § 1408, provided that the express conditions set forth in § 1408 are met, see 2 U.S.C. § 1410. An express condition of § 1408 is that the "defendant [in a CAA lawsuit] shall be the employing office alleged to have committed the [CAA] violation, or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b). The CAA defines the term "employing office." See 2 U.S.C. § 1301(9). While the office of a Member of Congress is an employing office, the Congress is not an employing office.[2] *Id.* Therefore, the CAA does not permit suit against the Congress.

3. The Campbell Office moved to dismiss Bastien's lawsuit pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause of the U.S. Constitution provides absolute immunity from all of her claims. On June 27, 2002, the district court granted the motion to dismiss. *Bastien v. Office of Senator Ben Nighthorse Campbell*, 209 F. Supp. 2d 1095 (D. Colo. 2002). The Tenth Circuit Court of Appeals reversed that decision on December 10, 2004. *Bastien v. Office of Senator Ben Nighthorse*

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[2] The Congress is not the personal office of a Member, see 2 U.S.C. § 1301(9)(A); nor is the Congress a committee, see 2 U.S.C. § 1301(9)(B); nor does the Congress have "the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of employment" of an employee, 2 U.S.C. § 1301(9)(C), see, *e.g.*, 2 U.S.C. §§ 60-1(a) (authorizing officers of Congress to determine the necessary qualifications of employees under their supervision and to remove or otherwise discipline such employees), 61-1(d)(2) (authorizing Senators to fix the number and the rates of compensation of employees in their respective offices and to establish such titles for the positions within their respective Senate offices); nor is the Congress an office listed in 2 U.S.C. § 1301(9)(D).

Campbell, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S. Ct. 396 (2005).

4. At noon on January 3, 2005, Senator Ben Nighthorse Campbell's term of office as a United States Senator expired,[3] see U.S. Const. amend. XX, § 1. (App. 13a.) Consequently, the Campbell Office, the sole defendant in this litigation, ceased to exist. (App. 14a.) Shortly thereafter, attorneys for the Campbell Office filed with the Tenth Circuit a Motion to Dismiss Appeal and Vacate Judgment on Grounds of Abatement. The basis of the motion was that because the Campbell Office no longer exists and Congress did not provide for a successor to the Campbell Office, this litigation abated upon dissolution of the Campbell Office. The Tenth Circuit denied the motion on the ground that the case had not been moot when the Tenth Circuit had issued its judgment on December 10, 2004. The Tenth Circuit remanded the case to the district court but expressly preserved the Campbell Office's right to raise the abatement issue after remand. See *Bastien v. Office of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235-36 (10th Cir. 2005).

On July 22, 2005, attorneys for the Campbell Office filed in the district court a Motion to Dismiss the Amended Complaint on Grounds of Abatement and Mootness ("Motion to Dismiss"). In opposition to the Motion to Dismiss, Bastien argued that the case could proceed against "the Senate" in place of the Campbell Office. After briefing and oral argument, the district court denied the Motion to Dismiss on December 5, 2005, and held that the case could proceed notwithstanding the dissolution of the Campbell Office because "the Congress" is

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[3] Senator Campbell chose not to run for reelection in 2004.

the true defendant and the Campbell Office is simply a nominal defendant representing the entire Congress. (App. 17a-19a.)

On December 16, 2005, attorneys for the Campbell Office moved for reconsideration of the district court's decision or, in the alternative, certification of the decision for immediate appeal pursuant to 28 U.S.C. § 1292(b). By order dated January 18, 2006, the district court declined to reconsider its decision denying the Motion to Dismiss but amended the decision to certify it for immediate appeal pursuant to 28 U.S.C. § 1292(b). (See App. 32a.) In certifying the appeal, the district court found the case "exceptional" because the "CAA's partial waiver of sovereign immunity is at stake." (App. 32a.)

5. The Campbell Office appealed to the Tenth Circuit pursuant to 28 U.S.C. § 1291 and filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). On March 3, 2006, the Tenth Circuit denied the petition to appeal pursuant to 28 U.S.C. § 1292(b) and ordered the parties to brief the sole issue of whether the district court's decision was immediately appealable pursuant to 28 U.S.C. § 1291. Following briefing, the Tenth Circuit, by order dated June 28, 2006, dismissed the appeal for lack of jurisdiction, concluding that the district court's order "do[es] not involve either immunity or separation of powers concerns." (App. 7a-8a.) On August 9, 2006, the Campbell Office filed a petition for rehearing en banc of the June 28 order. On August 31, 2006, the Tenth Circuit denied that petition. (App. 9a-10a.)

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision dismissing the Campbell Office's appeal warrants this Court's review and reversal for two reasons. First, this Petition is the last chance to correct an act of judicial legislation that infringes on the Campbell Office's sovereign immunity. Second, this Court should resolve a split among the circuit courts on the issue of whether on order denying a claim of federal sovereign immunity is immediately appealable. This issue was left unresolved by *Will v. Hallock*, 126 S. Ct. 952 (2006). The D.C. Circuit has held that such orders are immediately appealable because sovereign immunity is an immunity from suit. *In re Sealed Case No. 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999). The Seventh and Ninth Circuits have held that such orders are not immediately appealable because sovereign immunity is merely a defense to liability. See *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994); *Alaska v. United States*, 64 F.3d 1352, 1355-57 (9th Cir. 1995).

I. THE TENTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT'S ORDER DID NOT CONCERN EITHER SOVEREIGN IMMUNITY OR THE SEPARATION OF POWERS; THEREFORE THE TENTH CIRCUIT ERRED IN DENYING IMMEDIATE APPEAL FROM THAT ORDER

The Tenth Circuit's conclusion that the district court's decision denying the Motion to Dismiss did not "involve either immunity or separation of powers concerns" (App. 7a-8a) is erroneous. As explained below, the district court engaged in judicial legislation by creating a waiver of sovereign immunity where none previously had existed and, in so doing, intruded into the legislative sphere in violation of the separation of powers. An order denying a claim of federal sovereign

immunity, such as the district court's order denying the Motion to Dismiss, is effectively unreviewable on appeal after trial and, therefore, satisfies the third *Cohen*[4] factor for immediate appealability.

A. The CAA Does Not Permit Suit Against The Congress; Therefore The District Court's Order Concluding That This Case Can Proceed Because "The Congress" Is The True Defendant Denies Sovereign Immunity And Violates The Separation Of Powers

"The United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). Waivers of sovereign immunity "cannot be implied," *United States v. King*, 395 U.S. 1, 4 (1969); rather, a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Congress, not the judiciary, is empowered to subject congressional defendants to federal court litigation. See U.S. Const. art. I, § 1; see also *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) ("federal lawmaking power is vested in the legislative, not the judicial, branch of government"); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (citation omitted). Further, Congress, not the

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[4] See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

judiciary, is empowered to provide for a successor to a defunct government entity defendant. See *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1316 (11th Cir. 2006) (holding that a federal court cannot substitute an executive branch agency to defend a suit in place of a terminated government entity "[a]bsent an unequivocal statutory expression of Congress's intent to waive [the executive agency's] sovereign immunity").

The CAA provides that only an "employing office" can be the defendant in a CAA action.[5] 2 U.S.C. § 1408(b). In the case at bar, the employing office defendant ceased to exist, and, therefore, litigation against it abated. Cf. *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949) (when a government corporation dissolves, pending litigation against it abates because of the "'impossibility' of proceeding 'without a defendant'"); *Okla. Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927) ("dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant"). Accordingly, the Campbell Office filed the Motion to Dismiss.

Rather than dismissing this lawsuit as abated, however, the district court held that this CAA litigation could proceed in the absence of the Campbell Office because "the Congress" is the

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[5] Courts have dismissed from CAA lawsuits defendants that are not included among the employing offices the CAA delineates. See, *e.g.*, *Moss v. Lenhardt*, C.A. No. 02-01622 (RMC), Mem. Op. at 5 (D.D.C. Jan. 24, 2003) (case dismissed because "[n]either an individual nor the United States Senate constitutes an 'employing office' under section 1301(9) of the CAA") (unpublished); *Moore v. Capitol Guide Bd.*, 982 F. Supp. 35, 39 n.5 (D.D.C. 1997) (dismissing several named defendants because "the language of the statute requires an employee filing a claim in District Court to bring suit against the single employing office responsible for the alleged violation").

true defendant. (App. 17a-19a.) "The Congress," however, is not included among the more than 600 legislative branch entities the CAA identifies as defendant employing offices. See 2 U.S.C. § 1301(9) (definition of "employing office"). Indeed, Congress considered and rejected statutory language that would have permitted employment lawsuits against "the Congress." See, *e.g.*, S. 579, 103d Cong. § 2(c)(1) (1993) (would have permitted employment suits "against the Congress" in federal court); H.R. 2099, 103d Cong. § 2(c)(1) (1993) (would have permitted a civil action "against the Congress or the congressional employer of such employee" in federal court); H.R. 4444, 103d Cong. § 102(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court); H.R. 4850, 103d Cong. § 2(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court).[6] No such provision survived to final passage of the CAA, and the district court exceeded its authority by reading such a provision into the CAA. See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out"); see also *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) ("the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text").

Moreover, no provision of the CAA makes Congress the successor of the Campbell Office. The CAA "contains none of the language Congress usually employs to provide for the non-abatement of litigation and the substitution of successor entities." *ASEDAC*, 453 F.3d at 1316. In sharp contrast to the

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[6] Similarly, Congress rejected a proposal to make "the Senate" the defendant in CAA lawsuits. See H.R. 4822, 103d Cong. § 306(b) (reported in the Senate Oct. 3, 1994) ("the defendant shall – (1) in an action by an employee of the Senate, be the Senate").

CAA, numerous federal statutes explicitly provide for the avoidance of abatement and the substitution of parties in litigation involving government officers and entities upon their cessation. See, *e.g.*, 5 U.S.C. § 907(c) (2000) (providing that actions by or against the head of an executive branch agency do not abate by reason of an agency reorganization plan and that "within twelve months after the reorganization plan takes effect," a party may move for substitution of "the successor of the head . . . under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates"); 15 U.S.C. § 767(d) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of executive branch functions and agencies to create the Federal Energy Commission] . . . shall abate by reason of the [reorganization]" and permitting substitution of the United States in such proceedings); 20 U.S.C. § 3505(d), (e) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of the Department of Education] . . . shall abate by reason of the [reorganization]" and permitting substitution of the Secretary of Education in such proceedings); 22 U.S.C. § 6615(d), (e) (2000) (providing for "[n]onabatement of proceedings" and "[c]ontinuation of proceedings with substitution of parties" in connection with the reorganization and consolidation of the Foreign Affairs agencies); 22 U.S.C. § 6543(c), (d) (2000) (same); 42 U.S.C. § 7295(d), (e) (2000) (similar - Department of Energy).

The CAA unambiguously prohibits federal court adjudication of CAA lawsuits other than as the statute expressly articulates. "*Except as expressly authorized* by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this chapter and any action taken pursuant to this chapter *shall not be subject to*

judicial review." 2 U.S.C. § 1410 (emphasis added); see also 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under section[] . . . 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose . . . .").

When the district court denied the Motion to Dismiss and held that this litigation could proceed notwithstanding the dissolution of the Campbell Office because "the Congress" is the true defendant, the district court created a waiver of congressional sovereign immunity where none previously existed and thereby intruded into the legislative sphere in violation of separation of powers principles. *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984) (when courts "judicially rewrit[e]" statutes passed by Congress, they impermissibly "usurp the policy-making and legislative functions of duly-elected representatives."); see also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995) (courts have an "obligation to avoid judicial legislation"); cf. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (Court would require an explicit statement by Congress before assuming Congress had created a damages action against the President). Separation of powers principles require judicial restraint in the face of a policy decision by a coordinate branch of government to authorize CAA suits against only an "employing office" of Congress and not against "the Congress" or against an employing office that had ceased to exist. See *TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the

public weal.' Our Constitution vests such responsibilities in the political branches."). The district court failed to exercise this restraint.

The Tenth Circuit compounded the district court's error by denying the Campbell Office an immediate appeal from the district court's order. As argued below, the Tenth Circuit erroneously concluded that the district court's ruling on the Motion to Dismiss does not involve issues of immunity or separation of powers and, therefore, does not satisfy the third requirement for immediate appeal articulated in *Cohen*, 337 U.S. at 546.

B. Orders Denying A Claim of Sovereign Immunity Are Effectively Unreviewable On Appeal From A Final Judgment Because Sovereign Immunity Is An Immunity From Suit, As The D.C. Circuit Has Held, And Not Simply An Immunity From Liability, As The Seventh And Ninth Circuits Have Held; Therefore The District Court's Order Satisfies The Third *Cohen* Factor

An interlocutory order is appealable under the collateral order doctrine, identified with *Cohen*, if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted).[7]

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[7] When concluding that it lacked jurisdiction, the Tenth Circuit took issue only with the third *Cohen* factor. As discussed in sections II and III *infra*, the district court's order also satisfies the first and second *Cohen* factors.

Last term in *Will v. Hallock*, this Court reaffirmed that an order is effectively unreviewable on appeal from a final judgment when "some particular value of a high order [is] marshaled in support of the interest in avoiding trial: honoring the separation of powers." 126 S. Ct. at 959. In *Will* this Court cited *Nixon*, 457 U.S. 731, as precedent for the proposition that orders denying claims of absolute Presidential immunity are immediately appealable collateral orders because "'compelling public ends,' 'rooted in . . . the separation of powers'" make such orders effectively unreviewable on appeal from the final judgment. 126 S. Ct. at 959 (quoting *Nixon*, 457 U.S. at 749, 758) (citation omitted). *Will* did not resolve whether orders denying claims of federal sovereign immunity are effectively unreviewable on appeal from a final judgment.[8] The circuit courts are split on that issue. The D.C. Circuit has held that "federal sovereign immunity is an immunity from suit, not simply a defense to liability on the merits" and that "the right to be free from the burdens of trial is effectively unreviewable on appeal from a final judgment." *In re Sealed Case No. 99-3091*, 192 F.3d at 999. Consequently, the D.C. Circuit held that an order denying federal sovereign immunity "suffices to entitle [appellant] to an interlocutory appeal." *Id.* In contrast, the Seventh Circuit has held that an order denying a claim of

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[8] Having concluded that the district court's order did not involve issues of sovereign immunity or separation of powers, the Tenth Circuit in the case at bar never reached the issue of whether federal sovereign immunity is an immunity from suit. If this Court determines, however, that the district court's order did involve issues of sovereign immunity or separation of powers, this Court should determine whether such an order satisfies the third *Cohen* factor. See *Nixon*, 457 U.S. at 743 n.23 (observing that once the Court has taken jurisdiction of a case, it need not remand to the court of appeals for decision on the merits where immunity question is a pure question of law appropriate for immediate resolution by the Court and where concerns of judicial economy warrant decision of the question presented).

federal sovereign immunity is not immediately appealable because "[f]ederal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it." *Pullman*, 23 F.3d at 1168. See also *Alaska*, 64 F.3d at 1355 (Ninth Circuit dismissing interlocutory appeal of denial of claim of federal sovereign immunity because such immunity is a "right not to be subject to a binding judgment," which can be vindicated after trial, rather than a right to avoid trial altogether).

The holdings of the Seventh and Ninth Circuits are inconsistent with this Court's rulings. "The United States, as sovereign, is immune from *suit*," *Sherwood*, 312 U.S. at 586 (emphasis added), not just from liability; see also *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from *suit*.") (emphasis added); cf. *United States v. Mitchell*, 463 U.S. 206, 218 (1983) (observing that question of whether the government has waived sovereign immunity is "analytically distinct" from the question whether substantive law provides the claimant with the possibility of compensation).

As fully explained in Section I.A *supra*, the CAA does not authorize suit against "the Congress" or any other entity that is not an "employing office," including the non-existent Campbell Office. Thus, the district court's order permitting this suit to continue against the non-existent Campbell Office as a nominal stand-in for "the Congress" is a judicially created waiver of immunity from CAA litigation. This act of judicial legislation constitutes an intrusion into the legislative sphere in violation of separation of powers principles. See *TVA v. Hill*, 437 U.S. at 194-95. Accordingly, the district court order in the case at bar satisfies the requirement articulated in *Will* that "some particular value of a high order [is] marshaled in support of the

interest in avoiding trial: honoring the separation of powers." *Will*, 126 S.Ct. at 959. Therefore, the district court's order satisfies the third *Cohen* factor.

II. THE DISTRICT COURT'S ORDER ALSO SATISFIES THE FIRST *COHEN* FACTOR BECAUSE NO REVISION OF THE ORDER IS REASONABLY EXPECTED

The district court declined to revisit its ruling on the Motion to Dismiss in response to the Campbell Office's motion for reconsideration. (App. 30a.) The district court's ruling is a complete and conclusive determination, rather than a tentative order, because no revision of that ruling is reasonably expected. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983) (characterizing orders that satisfy the first *Cohen* factor as those "made with the expectation that they will be the final word on the subject addressed"); cf. *Coopers & Lybrand*, 437 U.S. at 469 (holding that a class decertification order is inherently tentative because it is subject to revision pursuant to Fed. R. Civ. P. 23(c)(1)). Therefore, the district court's order denying the Motion to Dismiss satisfies the first *Cohen* factor.

III. THE DISTRICT COURT'S ORDER ALSO SATISFIES THE SECOND *COHEN* FACTOR BECAUSE THE ORDER RESOLVES AN IMPORTANT ISSUE NOT TIED TO THE MERITS OF THIS CASE: WHETHER A FEDERAL COURT CAN CONTINUE TO ADJUDICATE A CAA LAWSUIT AGAINST A NON-EXISTENT SENATE OFFICE AS A NOMINAL STAND-IN FOR CONGRESS IN THE ABSENCE OF STATUTORY AUTHORIZATION TO SUE CONGRESS

The district court's order denying the Motion to Dismiss meets the second *Cohen* factor because the order resolves an important issue involving separation of powers and sovereign immunity not tied to the merits of the case. In holding that "Congress is the party which must answer to [Bastien's CAA] claims . . . ." (App. 17a), the district court exceeded the scope of the waiver of sovereign immunity Congress provided in the CAA, see 2 U.S.C. §§ 1408(b), 1410, 1413. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) ("When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'"). Indeed, the district court created a waiver of congressional sovereign immunity where none previously had existed.

The district court's order raises an issue entirely independent of the allegations in the Amended Complaint and truly collateral to the claims in this litigation because the issue will not "affect, or . . . be affected by, decision of the merits of this case." *Cohen*, 337 U.S. at 546.

Because the district court's order denying the Motion to Dismiss meets all three *Cohen* factors, the Tenth Circuit erred in concluding that the order is not immediately appealable.

CONCLUSION

For the reasons stated, this Court should grant certiorari.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

APPENDIX A

FILED
JUNE 28, 2006

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RITA BASTIEN, Plaintiff-Appellee, v. THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL, Defendant-Appellant.	No. 06-1047 (D.C. No. 01-CV-799-CAB-MEH)

ORDER

Before **TACHA**, Chief Circuit Judge, **KELLY** and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

would not materially assist the determination of this appeal. *See* 10th Cir. R. 27.2(B)(4). The case is therefore ordered submitted without oral argument.

Rita Bastien was employed as a staff member by the Office of Senator Ben Nighthorse Campbell ("Office"). After she was terminated, Ms. Bastien sued the Office under the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1301 *et seq.*, alleging that her termination was the result of age discrimination and retaliation. The matter is currently before the court on an interlocutory appeal filed by the Office challenging an order denying its motion to dismiss. We dismiss for lack of appellate jurisdiction.

BACKGROUND

The district court originally dismissed Ms. Bastien's complaint, concluding that the personnel actions taken by the Office were protected by the Speech or Debate Clause of the United States Constitution, U.S. Const. art. I, § 6 ¶ 1. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 209 F. Supp. 2d 1095, 1104 (D. Colo. 2002). On appeal, this court reversed and remanded. We held that only legislative acts, defined as official formal acts and perhaps their functional equivalent, are protected by the Speech or Debate Clause, and that, because Ms. Bastien's duties were not legislative and the personnel actions allegedly taken against her were not in themselves legislative, her CAA claim could proceed. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1305-06 (10th Cir. 2004).

Shortly after this court issued its opinion, Senator Campbell's term expired. The Office then filed a motion

to dismiss the appeal and vacate the judgment on the ground that the litigation abated when the Senator's term ended because the defendant then ceased to exist. We denied the motion, but stated that "[o]ur decision is without prejudice to [the Office] raising its abatement claim in district court." *Bastien v. Office of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1236 (10th Cir.), *cert. denied*, 126 S. Ct. 396 (2005). [sic - no petition for writ of certiorari was filed]

On remand the Office filed a motion to dismiss, arguing again that, because the Office, a necessary party to the litigation, ceased to exist, Ms. Bastien lost her right to proceed, and that the case had become moot. The district court denied the motion, concluding that under the CAA the term "employing office actually refers to Congress and Congress is the responsible entity under the CAA." *Bastien v. Office of Senator Ben Nighthorse Campbell*, 2005 WL 3334359, *4 (D. Colo. 2005) (unpublished). Accordingly, the court concluded that there is a party to respond to a possible judgment, that there are adverse parties, and that the court could grant relief. This order is the subject of this appeal.[1]

DISCUSSION

The CAA extends the protection of eleven workplace statutes, including the Age Discrimination in Employment Act, to congressional employees, and allows employees to file suit in federal district court. *See* 2

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[1] In addition to filing this appeal, the Office, after obtaining certification from the district court, filed a 28 U.S.C. § 1292(b) petition seeking permission to appeal. This court, however, denied the petition.

U.S.C. § § 1302 (a), 1404(2). The CAA explicitly retains Speech or Debate Clause immunity. *See id.* § 1413. In order to implement the provisions of the CAA, Congress created an independent office within the legislative branch called the Office of Compliance. *See id.* § 1381. The aggrieved employee may not file a complaint against the individual member, but only against the "employing office." *See id.* § 1408(b). The term "employing office" in this case means the "personal office of a Member of the House of Representatives or of a Senator." *See id.* § 1301(9)(A). Damages are paid from an account specifically appropriated for such purpose into the Office of Compliance's account in the Treasury. *See id.* § 1415(a).

The Office argues that because the district court's erroneous interpretation of the CAA results in a denial of its sovereign immunity and a violation of the principle of separation of powers, this interlocutory appeal falls within the collateral order doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949).

There are three conditions which must be met for collateral order review. The order being appealed must: "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 126 S. Ct. 952, 957 (2006) (internal cites and quotes omitted).

In *Will*, the Supreme Court's most recent pronouncement on the collateral order doctrine, the Court stressed that only a very few types of interlocutory orders can qualify as immediately appealable collateral orders.

The requirements are "stringent and unless they are kept so, the underlying doctrine will overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further." *Id.* (cites and quotes omitted). *Will* noted the four kinds of interlocutory orders which may be immediately appealed: those rejecting claims of absolute immunity, qualified immunity, and Eleventh Amendment immunity, and those issuing an adverse ruling on a double jeopardy defense. *Id.* at 958.

In discussing the requirement that the order must be effectively unreviewable from a final judgment, the Court explained that

> [s]ince only some orders denying an asserted right to avoid the burdens of trial qualify, then, as orders that cannot be reviewed 'effectively' after a conventional final judgment, the cases have to be combed for some further characteristic that merits appealability under *Cohen*, and that something further boils down to a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.
>
> ...
>
> In each case [where an interlocutory appeal has been allowed], some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual.

> That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later.

Id. at 958-59 (internal cites and quotes omitted).

The Office relies on this circuit's opinion in *United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003), decided before *Will*, in which this court held that a district court order which disqualified the entire United States Attorney's office for the Western District of Oklahoma from representing the government on a criminal defendant's motion to compel, was immediately appealable under *Cohen*. The *Bolden* court held that the injury to the government by the district court's order was grounded in separation of powers and could not be effectively vindicated on appeal from a final judgment. "The interests protected by the doctrine simply will not abate during the possibly lengthy resolution of this matter, and appellate vindication cannot undo such an invasion of Executive authority." *Id.* at 878.

The Office argues that its appeal raises separation of powers issues, as in *Bolden*, as well as sovereign immunity concerns. The Office contends that under the CAA judicial review is limited, *see* 2 U.S.C. § 1410, and that by allowing Ms. Bastien's case to proceed, the district court went beyond its statutory authority, resulting in a violation of separation of powers and the denial of sovereign immunity.

Section 1410 states that

> Except as expressly authorized by sections 1407[2], 1408[3], and 1409[4] of this title, the compliance or noncompliance with the provisions of this chapter and any action taken pursuant to this chapter shall not be subject to judicial review.

Contrary to the Office's assertion, Ms. Bastien's action falls within the judicial review provided in § 1408. *See id.* § 1408 ("The district courts of the United States shall have jurisdiction over any civil action commenced under section 1404 of this title and this section by a covered employee who has completed counseling under section 1402 of this title and mediation under section 1403 of this title. A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and medication.").

As much as the Office tries to couch its argument in terms of immunity and separation of powers, the issues are abatement and mootness: whether Ms. Bastien's cause of action ceased to exist and/or became moot when Senator Campbell left office. These issues do not involve

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[2] Section 1407 provides that the Court of Appeals for the Federal Circuit shall have jurisdiction to review decisions of the Board of Directors of the Office of Compliance.

[3] Section 1408 requires that an employee must complete counseling and mediation before filing suit in district court. The Office does not claim that Ms. Bastien has not met these requirements.

[4] Section 1409 allows for judicial review of regulations issued under the CAA.

either immunity or separation of powers concerns. When Ms. Bastien originally filed this action, the district court had jurisdiction to hear the matter. The fact that Senator Campbell's term subsequently expired does not raise questions of either immunity or separation of powers.

Accordingly, this appeal is **DISMISSED**.

Entered for the Court
PER CURIAM

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RITA BASTIEN, Plaintiff - Appellee, v. THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL, Defendant - Appellant.	No. 06-1047

ORDER
Filed August 31, 2006

Before **TACHA**, Chief Circuit Judge, **KELLY** and **HENRY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in

regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by:
Deputy Clerk

APPENDIX C

FILED
DECEMBER 5, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-CV-799-CAB (OES)

RITA BASTIEN,

Plaintiff,

v.

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

This matter is before the Court on Defendant's Motion to Dismiss the Amended Complaint on the Grounds of Abatement and Mootness. After considering the motion, having reviewed the materials on file, having heard oral argument, and being fully advised in the premises, the Court **FINDS** and **ORDERS** as follows:

BACKGROUND

Plaintiff Rita Bastien ("Bastien") was employed by Defendant, the Office of Senator Ben Nighthorse Campbell, from July 7, 1994 until April 10, 2001. From July 7, 1994, through September 4, 2000, Plaintiff served as a Senate Aide in Defendant's Englewood, Colorado office. On September 5, 2000, Defendant transferred Plaintiff to the Colorado Springs, Colorado office. She worked there until her termination on April 10, 2001.

On April 30, 2001, Plaintiff filed suit against Defendant under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1302-1438 ("the CAA"), and the Age Discrimination in Employment Act of 1967 ("the ADEA"), 29 U.S.C. § 621 *et seq.* On September 10, 2001, Plaintiff filed an Amended Complaint, which included a claim for retaliation. The Amended Complaint alleged that Defendant discriminated against Plaintiff, due to her age, by treating her less favorably than younger staff members. Specifically, Plaintiff claimed that Defendant paid her less, gave her less favorable job assignments, transferred her without reason, increased her job duties without reimbursement, increased her expenses without reimbursement, and terminated her without cause. See Amended Complaint at 9.

On June 27, 2002, this Court dismissed Plaintiff's claims. Bastien v. Office of Campbell, 209 F. Supp. 2d 1095, 1106 (D. Colo. 2002). The Court reasoned that Plaintiff's job responsibilities "were directly related to the due functioning of the legislative process" and, therefore, Defendant's decision to transfer, and later terminate, Plaintiff was "immunized by the protections

afforded by the Speech or Debate Clause of the United States Constitution." Id.

The Plaintiff appealed the decision and on December 10, 2004, the United States Court of Appeals for the Tenth Circuit reversed this Court's ruling. Bastien v. Office of Senator Ben Nighthorse Campbell, 390 F.3d 1301, 1319 (10th Cir. 2004). The Tenth Circuit held that "[a] personnel decision is not a legislative act, as defined by the Supreme Court, and is therefore not entitled to immunity." Id. at 1318 (internal quotations omitted). The Court of Appeals also found that Plaintiff's "discussions with constituents and others were not an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." Id. at 1319 (citing Gravel v. United States, 408 U.S. 606, 625 (1972)) (internal quotations omitted).

On January 3, 2005, Senator Ben Nighthorse Campbell's term of office expired. Shortly thereafter, and before the Tenth Circuit had filed a mandate in this Court, the Senator's former office filed a motion before the Court of Appeals requesting that the appeal be dismissed on the grounds of abatement. Essentially, Defendant argued that the case abated when the Senator's term ended as there was no longer a Senate Office for Ben Nighthorse Campbell eligible for suit under the CAA. The Tenth Circuit, however, declined to grant the motion and subsequently issued the mandate. See Bastien v. Office of Senator Ben Nighthorse Campbell, 409 F.3d 1234, 1236 (10th Cir. 2005).

Once the mandate issued, the Defendant filed a motion to dismiss before this Court. The motion to

dismiss is very similar to the abatement motion submitted to the Tenth Circuit. Essentially, Defendant contends that a necessary party to the suit, the Office of Senator Nighthorse Campbell, ceased to exist on January 3, 2005. Thus, according to Defendant, this suit cannot proceed.

DISCUSSION

The CAA applies the protections of eleven workplace statutes to employees of the federal legislative branch.[1] See 2 U.S.C. 1302(a)(1)-(11); Bastien, 390 F.3d at 1304. For instance, the Act protects legislative employees from employment discrimination based on age, race, color, religion, sex, national origin, or disability. 2 U.S.C. § 1311(a). The CAA also prohibits a covered employer from retaliating against an employee for exercising his or her rights under the Act. Id. § 1317.

In order to implement the provisions of the Act, Congress created an independent office within the legislative branch known as the Office of Compliance

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[1] The statutes applied to Congress by the CAA are: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; (2) the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*; (3) the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; (4) the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*; (5) the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 *et seq.*; (6) the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*; (7) Chapter 71 of Title 5 (related to federal service labor-management relations); (8) the Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 *et seq.*; (9) the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*; (10) the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; and (11) Chapter 43 of Title 38 (relating to veterans' employment and reemployment). See 2 U.S.C. § 1302; Dotson v. Griesa, 398 F.3d 156, 173 (2d Cir. 2005).

("OOC"). See id. § 1381; Senator Charles Grassley & Jennifer S. Schmidt, Practicing What We Preach: A Legislative History of Congressional Accountability, 35 Harv. J. on Legis. 33, 46 (1998) ("The Office of Compliance is an independent, nonpartisan office within the Legislative Branch set up to administer and enforce the laws applied by the Congressional Accountability Act."). The OOC, through a five-member Board of Directors, is responsible for promulgating the regulations necessary to apply the CAA to Congress. Bastien, 390 F.3d at 1304. The OOC must also oversee the elaborate complaint procedure created by the Act. See 2 U.S.C. §§ 1401-1406; James J. Brudney, Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees, 36 Harv. J. on Legis. 1, 9 (1999).

The complaint procedure created by the CAA, which establishes the exclusive method through which a congressional employee may bring a claim against their employer for a violation of any of the protections provided by the Act, contains several steps. See id. §§ 1361(d)(1); 1401-08. First, the aggrieved employee must take part in counseling and mediation sessions. Id. §§ 1401-03. The next step allows the employee to make an election: she can either file a complaint with the OOC and obtain a hearing before a hearing officer or she may file suit in federal district court. Id. §§ 1401, 1404. If the employee chooses to file a formal complaint with the OOC and receives an unfavorable decision, she can then appeal to the Board of Directors of the OOC and, if need be, then to the United States Court of Appeals for the Federal Circuit. Id. §§ 1406-07.

Under the Act, whether the employee pursues the administrative appeal or the civil action, the employee may only file a complaint against his or her "employing office." See id. §§ 1405(a) & 1408(b); Bastien, 390 F.3d at 1304. The term "employing office," as it pertains to this case, means "the personal office of a Member of the House of Representatives or of a Senator . . . ." 2 U.S.C. § 1301(9)(A). A congressional employee may not file a claim against an individual member of Congress. See Bastien, 390 F.3d at 1304; Brudney, supra, at 10. Once a complaint is made, the employing office is represented by either the Office of House Employment Counsel or the Senate Chief Counsel for Employment. See Bastien, 390 F.3d at 1304 (citing 2 U.S.C. § 1408(d); Brudney, supra, at 10 n.46). Any damages that result from a complaint are paid from OOC's treasury account. 2 U.S.C. § 1415. Thus, a member of Congress cannot be individually liable for damages under the CAA. See Brudney, supra, at 10-11 (noting that the CAA immunizes congressional members from personal liability).

In this case, Plaintiff elected to file suit against her employing office, the Office of Senator Ben Nighthorse Campbell, as required by the CAA. At the time that she filed the suit, Senator Campbell was still in office. However, during the pendency of this case, which included an appeal to the Tenth Circuit, Senator Campbell ceased to hold office. Defendant claims that such fact has caused the case to abate. Defendant argues that Plaintiff has lost her right to proceed under the CAA because the Office of Senator Ben Nighthorse Campbell has ceased to exist. Essentially, Defendant argues there is no longer a proper defendant in this case. Defendant further contends that such facts make the case moot.

Thus, the question now pending before the Court, which as far as the Court can tell is a matter of first impression, is whether a suit against a member of Congress under the CAA abates or becomes moot when the member leaves office. For the following reasons, the Court finds that it does not.

I. Abatement

"[A]batement of a case usually follows, as of course, when there is no one to respond to a judgment which might be or has been entered in a case. When a case reaches that posture the futility of its continuing is evident, and it abates." Acheson v. Fujiko Furusho, 212 F.2d 284, 288 (9th Cir. 1954), cited with approval in Tom Wing Po v. Acheson, 214 F.2d 661, 661 (10th Cir. 1954). Thus, the Court must determine whether there is a party to respond to a judgment which might be entered in this case even though Senator Nighthorse Campbell no longer holds office. After reviewing the CAA, and studying its legislative history extensively, the Court finds that there is such a party. The CAA, along with its corresponding history, make clear that Congress is the party which must answer to claims filed thereunder, not the individual members. Thus, the fact that Senator Nighthorse Campbell is no longer in office is irrelevant.

A review of the several aspects of the CAA supports the Court's conclusion. For example, under the CAA, the defendant in any civil case filed under the Act must be "the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b). A member of Congress cannot be a named defendant under the CAA. See Bastien, 390 F.3d at 1304; Brudney, supra, at 10. Any

settlements or damage awards that result from a suit under the Act are paid from a congressional treasury account. 2 U.S.C. § 1415. The individual members cannot be liable under the CAA. See id.; Brudney, supra, at 10. In addition, any time a congressional office is named as a defendant in a CAA case, such office is represented by either the Office of House Employment Counsel or the Senate Chief Counsel for Employment. See Bastien, 390 F.3d at 1304 (citing 2 U.S.C. § 1408(d); Brudney, supra, at 10 n.46). The member does not hire his or her own private attorney. See Brudney, supra, at 10.

All of these facets of the CAA indicate that Congress, in passing the Act, intended that it, as an institution, be responsible for the acts of its members, at least in the financial sense of the term. See Brudney, supra, at 10 ("[T]he CAA shields members themselves from litigation even while making Congress accountable as an institution."); Steven F. Huefner, The Neglected Value of the Legislative Privilege in State Legislatures, 45 Wm. & Mary L. Rev. 221, 307 (2003) (noting that the Congressional Accountability Act "allows congressional employees to bring personnel actions only against the institution through the 'employing office' of the employee, rather than personally against an individual legislator"). In order to effectuate this policy, Congress created the fictional entity of the "employing office" to serve as the defendant in any CAA case. This entity, however, does not represent the individual member of Congress. Rather, it represents Congress as a whole. The term "employing office" does nothing more than indicate where the discrimination occurred.

As previously found by this Court, the term "employing office" actually refers to Congress and Congress is the responsible entity under the CAA. These findings combined with the fact that Congress is a continuing party indicate that there is a party to answer to any judgment that may be attained in this case.

The Court's decision is supported by the purpose of the CAA. The CAA was enacted to "fully apply antidiscrimination and employee protection laws to Congress." 141 Cong. Rec. S439-03, S442 (statement of Senator Grassley). The Act intended to provide congressional employees with the same employment rights as workers in the private sector.[2] See id. at S441. It "stands for the basic proposition that those who make the laws in this country have to live under the laws that they make, as other citizens do." Id. at S450 (statement of Senator Thompson). Senator Grassley, co-sponsor of the CAA, spoke to the purpose of the Act in the following terms:

> The purpose of this legislation is to end the environment in this country where we have two sets of laws-one for Capitol Hill and the one for

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[2] Prior to 1995, congressional employees were not entitled to all of the employment rights that employees in the private sector enjoyed. See Larson, supra, § 5.04[5]. For instance, congressional employees could not bring suit in federal court to enforce their rights. Id. In addition, any rights that congressional employees did have were created by several different statutes that were less than ideal in terms of organization. See id. (noting that prior to 1995 congressional employees were covered by a patchwork quilt of laws); 141 Cong. Rec. S439-03, 442 (statement of Senator Grassley discussing the laws that protected congressional employees prior to 1995).

> everybody else, everywhere else in the country. It will end a situation where there is one set of laws for Pennsylvania Avenue and another set of laws for Main Street, U.S.A. It will end the situation where employees of Congress do not have the same employment and safety rights and access to the courts for the enforcement of those rights that private sector employees have.

141 Cong. Rec. S529-04, S533 (statement of Senator Grassley). See also Lex K. Larson, Employment Discrimination § 5.04[5] (2d ed. 2005) (noting that the purpose of the CAA was to make "applicable to both houses of Congress the same laws that apply to private sector employees").

Defendant's argument, however, completely ignores the policy of the CAA. According to Defendant's interpretation of the statute, members of Congress could discriminate against their employees in the last months, or even years, of their term and prevent recovery on the part of the employees by simply not returning to office. In other words, if the member knew he or she was not returning to office next term, he or she could discriminate at will for any reason they wished and the employees would have no recourse for the unlawful acts. Surely, this was not the intent of the Congress when it passed the CAA. As noted above, Congress passed the CAA to make the legislative branch subject to the same laws as the private sector and to give congressional employees the same rights as employees in the private workplace. Defendant's theory would not support this goal; it would once again give congressional members the immunity that the CAA intended to take away. Defendant's argument would also, in contravention of the purpose of the CAA,

subject Congress to different standards than private employers as it is well-known that private employers cannot avoid liability by simply resigning from their job. Thus, the Court must reject Defendant's argument. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); Harebert v. Healthcare Services Group, 391 F.3d 1140, 1149 (10th Cir. 2004) ("Courts must guard against interpretations that might defeat a statute's purpose.").

II. Mootness

In addition to claiming that this case has abated, Defendant also avers that this case became moot when Senator Nighthorse Campbell left office. However, "[t]he burden of demonstrating mootness is a heavy one." Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (internal quotations omitted). "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." McClendon v. City of Albuquerque, 100 F.3d 863, 867 (10th Cir. 1996). "Article III of the Constitution allows federal courts to adjudicate only 'actual, ongoing controversies.'" Shawnee Tribe v. United States, 423 F.3d 1204, 1212 (10th Cir. 2005) (quoting Honig v. Doe, 484 U.S. 305, 317 (1988)). Federal courts are "not empowered to decide moot questions or abstract propositions." North Carolina v. Rice, 404 U.S. 244, 246 (1971); see also Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997). Thus, once an actual, ongoing controversy ceases to exist the case becomes moot and the court lacks

jurisdiction to hear the case. See United States v. Seminole Nation of Oklahoma, 321 F.3d 939, 943 (10th Cir. 2002).

"Constitutional mootness exists when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Schutz v. Thorne, 415 F.3d 1128, 1138 (10th Cir. 2005) (citing Los Angeles County, 440 U.S. at 631) (internal quotations omitted). As Defendant correctly points out, such a situation arises when "there are no longer adverse parties with sufficient legal interests to maintain the ligitation." Goldin v. Bartholow, 166 F.3d 710, 717 (5th Cir. 1999); see also Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1298 (3rd Cir. 1996) ("For there to be an actual controversy the defendant must be so situated that the parties have adverse legal interests."); Lankford v. City of Hobart, 73 F.3d 283, 288 (10th Cir. 1996) ("A claim is moot when the controversy no longer touches the legal relations of parties having adverse legal interests in the outcome of the case."). A case also "becomes moot when it becomes impossible for the court to grant any effectual relief whatever to a prevailing party." District 22 United Mine Workers of America v. Utah, 229 F.3d 982, 987 (10th Cir. 2000).

However, none of the circumstances outlined above are present in this suit. In the case *sub judice*, there continues to be adverse parties with adverse legal interests. Specifically, those parties are Plaintiff Bastien and Defendant Office of Senator Nighthorse Campbell, which, as stated above, is a fictional entity representing Congress itself. Furthermore, the Court can also grant relief in this case as any judgment obtained by Plaintiff will be satisfied through a congressional treasury account

established by the CAA. See 2 U.S.C. § 1415. Such a prospective judgment, which would settle the dispute between the Plaintiff and Defendant, indicates that this case is not moot. See Wirsching v. Colorado, 360 F.3d 1191, 1196 (10th Cir. 2004) ("Generally, it is the settling of some dispute which affects the behavior of the defendant toward the plaintiff that distinguishes a case or controversy from an advisory opinion." (internal quotations and citations omitted)); Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) ("The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.").

III. The Named Defendant

In a letter to the Court dated August 29, 2005, Counsel for Defendant requested the Court to "specify in the Order who the defendant will be for the remainder of the litigation." Although the Court is unsure of the basis or need for this request, the Court notes that Defense Counsel mentioned in her letter that she was concerned about future disputes regarding the attorney-client privilege. Thus, in an effort to avoid future disputes on this issue and thereby conserve judicial resources, the Court will address Defense Counsel's request.

As noted above, the term "employing office" does not refer to the individual member of Congress. Thus, the cessation of any member's term of office does not affect the named defendant in a CAA case. The defendant in a CAA suit will always be the employing office, which represents Congress itself. This means that the Defendant in this case will continue to be represented by Senate Chief Counsel for Employment and that any

judgment that might be awarded in this case will be satisfied by Congress.

This ruling does not, however, dictate that the Senator, as an individual, has waived his attorney-client privilege in regards to conversations he may have had with the Senate Chief Counsel for Employment. Until this Order, the Senator may have presumed he was the defending party and may have made statements to the Senate Chief Counsel under this impression. However, the fact that the Court has ruled otherwise does not change the fact that the Senator relied upon this assumption in prior litigation preparation. "It is not necessary that an attorney-client relation have actually existed. One who consults a lawyer with a view to obtaining professional legal services from him or her is regarded as a client for purposes of the privilege." 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2017 (2d ed. 1994). Therefore, the conversations between the Senator and the Senate Chief Counsel are privileged and can only be discovered if the Senator wishes to waive the privilege. See United States v. Johnston, 146 F.3d 785, 794 (10th Cir. 1998) (noting that "the client alone holds the attorney-client privilege"); In re Vargas, 723 F.2d 1461, 1466 (10th Cir. 1983) (stating that "attorney cannot waive the attorney-client privilege without the client's consent").

CONCLUSION

In accordance with the foregoing discussion, and for the reasons stated therein, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss the Amended

Complaint on the Grounds of Abatement and Mootness is **DENIED**.

IT IS FURTHER ORDERED that the Office of Senator Nighthorse Campbell will continue to be the named defendant in the above-captioned case. However, notwithstanding the Court's ruling, any statements made by the Senator to the Senate Chief Counsel in relation to this suit will continue to be privileged.

Dated this 1st day of December, 2005.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE
SITTING BY DESIGNATION

APPENDIX D

FILED
JANUARY 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-cv-00799-CAB (OES)

RITA BASTIEN,

Plaintiff,

v.

THE OFFICE OF SENATOR BEN NIGHTHORSE CAMPBELL,

Defendant.

Order Denying Motion to Reconsider In Part and Modifying Previous Order to Certify It for Immediate Appeal

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This matter is before the Court on Defendant's Motion for Reconsideration or, in the Alternative, for Certification of the Court's Order for Immediate Appeal Pursuant to 28 U.S.C. § 1292(b), which seeks reconsideration of this Court's Order Denying

Defendant's Motion to Dismiss the Amended Complaint filed on December 12, 2005. Plaintiff opposes the motion. After considering the motion, having reviewed the materials on file, and being fully advised in the premises, the Court **FINDS** and **ORDERS** as follows:

Background

Plaintiff Rita Bastien was employed by Defendant, the Office of Senator Ben Nighthorse Campbell, from July 7, 1994, until she was terminated on April 10, 2001. Plaintiff subsequently filed suit against Defendant under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1302-1438 ("the CAA" or "the Act"), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq*. Her Amended Complaint alleged that Defendant discriminated against her because of her age by treating her less favorably than younger staff members.

Plaintiff's suit was possible because the CAA waived federal sovereign immunity in part and applied the protections of eleven workplace statutes to employees of the federal legislative branch. See 2 U.S.C. § 1302(a)(1)-(11); Bastien v. Office of Senator Ben Nighthorse Campbell, 390 F.2d 1301, 1304 (10th Cir. 2004). The complaint procedure created by the CAA contains several steps. See id. §§ 1361(d)(1); 1401-08. First, the aggrieved employee must take part in counseling and mediation sessions. Id. §§ 1401-03. The next step allows the employee to make an election: she can either file a complaint with the Office of Compliance ("the OOC"), which is an independent office within the legislative branch created to implement the Act, and obtain a hearing before a hearing officer or she may file

suit in federal district court. Id. §§ 1401, 1404. If the employee chooses to file a formal complaint with the OOC and receives an unfavorable decision, she can then appeal to the Board of Directors of the OOC and then, if necessary, to the United States Court of Appeals for the Federal Circuit. Id. §§ 1406-07.

Under the Act, whether the employee pursues the administrative appeal or the civil action, the employee may only file a complaint against his or her "employing office." See id. §§ 1405(a) & 1408(b); Bastien, 390 F.3d at 1304. The term "employing office," as it pertains to this case, means "the personal office of a Member of the House of Representatives or of a Senator . . . ." 2 U.S.C. § 1301(9)(A). A congressional employee may not file a claim against an individual member of Congress. See Bastien, 390 F.3d at 1304. Once a complaint is made, the employing office is represented by either the Office of House Employment Counsel or the Senate Chief Counsel for Employment. See Bastien, 390 F.3d at 1304 (citing 2 U.S.C. § 1408(d); James J. Brudney, Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees, 36 Harv. J. on Legis. 1, 9 (1999)). Any damages that result from a complaint are paid from OOC's treasury account. 2 U.S.C. § 1415. Thus, a member of Congress cannot be individually liable for damages under the CAA. See Brudney, supra, at 10-11 (noting that the CAA immunizes congressional members from personal liability).

In this case, Plaintiff elected to file suit in federal district court against her employing office, the Office of Senator Ben Nighthorse Campbell, as required by the

CAA. At the time that she filed the suit, Senator Campbell was still in office.

On June 27, 2002, this Court dismissed Plaintiff's claims. Bastien v. Office of Campbell, 209 F. Supp. 2d 1095, 1106 (D. Colo. 2002). The Court reasoned that Plaintiff's job responsibilities "were directly related to the due functioning of the legislative process" and, therefore, Defendant's decision to transfer, and later terminate, Plaintiff was "immunized by the protections afforded by the Speech or Debate Clause of the United States Constitution." Id.

In December of 2004, the United States Court of Appeals for the Tenth Circuit reversed this Court's ruling. Bastien, 390 F.3d at 1319. The Tenth Circuit held that "[a] personnel decision is not a legislative act, as defined by the Supreme Court, and is therefore not entitled to immunity." Id. at 1318 (internal quotations omitted). The Court of Appeals also found that Plaintiff's "discussions with constituents and others were not an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." Id. at 1319 (citing Gravel v. United States, 408 U.S. 606, 625 (1972)) (internal quotations omitted).

On January 3, 2005, Senator Ben Nighthorse Campbell's term of office expired. Shortly thereafter, and before the Tenth Circuit had filed a mandate in this Court, the Defendant filed a motion before the Court of Appeals requesting that the appeal be dismissed on the grounds of abatement. Essentially, Defendant argued that the case abated when the Senator's term ended as there was no longer a Senate Office for Ben Nighthorse

Campbell eligible for suit under the CAA. The Tenth Circuit declined to address the issue of abatement, denied the motion, and issued the mandate. See Bastien v. Office of Senator Ben Nighthorse Campbell, 409 F.3d 1234, 1236 (10th Cir. 2005).

Once the mandate issued, the Defendant filed a motion to dismiss before this Court, arguing that this case abated because the Office of Senator Ben Nighthorse Campbell had ceased to exist on January 3, 2005. This Court denied Defendant's motion to dismiss because although a Congress member's "employing office" was the nominal defendant under the CAA, Congress must ultimately answer for CAA claims. Therefore, the expiration of Senator Nighthorse Campbell's term of office was irrelevant.

Reconsideration of this Court's Interpretation of the CAA

"Reconsideration may be granted upon 'an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice.'" Grimaldo v. Reno, 189 F.R.D. 617, 618 (D. Colo. 1999) (quoting Brumark Corp. v. Samson Resources Corp., 57 F.3d 941, 948 (10th Cir. 1995)). Here, Defendant argues reconsideration is appropriate because this Court committed clear error by ignoring the plain meaning of the statute. The Court disagrees and **FINDS** that it did not commit clear error in its Order Denying Defendant's Motion to Dismiss the Amended Complaint.

Certification for Immediate Interlocutory Appeal

A district judge may certify an order in a civil case for immediate interlocutory appeal if "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A district judge who is of the opinion that the order should be immediately appealable under section 1292(b) must so state in the subject order. Id. If it so chooses, the appropriate Court of Appeals may then take jurisdiction over the appeal if application is made within ten (10) days of the order. Id. However, an "application for an appeal . . . shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Id.

In this civil case, the abatement question that decided Defendant's motion to dismiss turned upon an interpretation of CAA's "employing office" provisions and the function of those provisions within the overall structure of the CAA. As such, it was a controlling question of law. In addition, it was a novel question that had never been addressed in a published opinion by any other federal court. The Court continues to believe that it appropriately interpreted the CAA and rightly denied Defendant's motion to dismiss, but it acknowledges that there is substantial ground for difference of opinion on this question. Finally, if the Court of Appeals were to hold that this cause of action abated when Senator Nighthorse Campbell left the Senate, the litigation would end without the substantial -- and ultimately fruitless -- expense of further discovery and trial. The Court therefore **FINDS** that the Order Denying Defendant's

Motion to Dismiss the Amended Complaint meets the statutory requirements of 28 U.S.C. § 1292(b) for certification for immediate appeal.

Although the abatement question in this case meets the threshold requirements of section 1292(b), questions should not be indiscriminately certified for immediate review because piecemeal appellate review is inefficient and can needlessly prolong litigation. For this reason, and in accord with the decisions of the Tenth Circuit, this Court will only certify a question for interlocutory appeal in exceptional cases where an immediate appeal might avoid protracted litigation that is otherwise unnecessary. See, e.g. Burchett v. Bardahl Oil Co., 470 F.2d 793, 796 (10th Cir. 1972). The Court **FINDS** this case to be exceptional because the scope of the CAA's partial wavier of sovereign immunity is at stake. See McSurely v. McClellan, 697 F.2d 309, 316 n.12 (D.C. Cir. 1982) (noting that the certification procedure authorized by section 1292(b) is "particularly appropriate when claims of immunity are at issue.").

Conclusion

For the reasons stated above, the Court has reconsidered the Order Denying Defendant's Motion to Dismiss the Amended Complaint to the extent that it did not include a certification for appeal. Therefore, it is hereby **ORDERED** that this Court's Order Denying Defendant's Motion to Dismiss the Amended Complaint previously filed on December 12, 2005, is **MODIFIED** to include a certification of that Order for appeal under 28 U.S.C. § 1292(b). It is **FURTHER ORDERED** that said certification is limited to this Court's interpretation of the Congressional Accountability Act of 1995, 2

U.S.C. §§ 1302-1438, and the findings regarding the abatement question and Defendant's motion to dismiss -- the attorney-client privilege issue also decided in that Order is not certified for immediate appeal. It is **FURTHER ORDERED** that the effective date of the modified Order Denying Defendant's Motion to Dismiss the Amended Complaint shall be the same date as the present order is filed.

In all other respects, Defendant's Motion for Reconsideration or, in the Alternative, for Certification of the Court's Order for Immediate Appeal Pursuant to 28 U.S.C. § 1292(b) is **DENIED**.

The Court will not stay the proceedings in this case at this time. The parties may request a stay if the Court of Appeals accepts jurisdiction over any appeals of the modified Order Denying Defendant's Motion to Dismiss the Amended Complaint.

Dated this 13th day of January, 2006.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE
SITTING BY DESIGNATION